United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

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76-1128

United States Court of Appeals
For the Second Circuit

UNITED STATES OF AMERICA,

Appellant,

-against-

DAVY TREGCAGNOLI, BENJAMIN RAUGI, FRANK FORMOSA, JOSEPH PALERMO, et al.,

Defendants-Appellees.

On Appeal From The United States District Court For The Southern District of New York

BRIEF FOR THE APPELLEES DAVY TREGCAGNOLI, BENJAMIN RAUGI, FRANK FORMOSA, and JOSEPH PALERMO

PETER J. PELUSO
Attorney for Defendant-Appellee Davy Tregcagnoli
11 Park Place
New York, N.Y.
(212) 233-5230

FREDERICK S. GOLDSTEIN
Attorney for Defendant-Appellee Benjami Raugi
335 Broadway
New York, N.Y.

ROBERT BLOSSNER
Attorney for Defendants-Appellees Frank Formosa and Joseph Palermo
250 Broadway
New York, N.Y.

ARNOLD E. WALLACH
On the Brief

DICK BAILEY PRINTERS, 290 Richmond Ave., Staten Island, N.Y. 10302
Telephone: (212) 447-5358

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PRELIMINARY STATEMENT

The appellees were charged in an indictment rendered by a grand jury of the South[illegible] District of New York containing two counts. The first count based on the general conspiracy statute 18 U.S.C. 371 charged the defendants with combining to violate Sections 225.05 and 225.10 of the Penal Law of the State of New York, by maintaining an illegal gambling business, involving 5 or more persons to do the acts or undergo the conduct described in said count, and further alleging that the said business was to endure for 30 days or more, having a gross revenue of $2,000 a day. (Actually these elements comprise 18 U.S.C. 1955). And a second count, charging a violation of 18 U.S.C. 1955 and 2.

The appellee Tregcagnoli moved before trial to suppress

the evidence that was the product of electronic surveillance, conducted under various electronic surveillance warrants issued by various judges of the Southern and Eastern Districts of New York.

The motion came on to be heard before Judge Griesa, a Judge of the United States District Court, Southern District of New York and was granted. One of the grounds underlying the motion was that the tapes that were used to "seize" the communications were not presented to the appropriate judge for a direction as to sealing in a timely fashion or immediately.

The other above named appellee joined in the said motion.

ISSUES PRESENTED FOR REVIEW

Where the authorities do not present the tape for sealing in conformity with 18 U.S.C. 2518(8)(a) and do not offer a satisfactory explanation for the seal required under that statute, should the Court below have directed the suppression of the evidence under 18 U.S.C. 2518(10)(a)? Are the Electronic Surveillance Statutes constitutional?

STATEMENT OF FACTS

Edward M. Shaw, a special attorney who was then in charge of the New York Joint Strike Force, in paragraph 7 of his affidavit admitted that the authorities did not "immediately" take recourse to the Court for a direction as to sealing the

tapes and the further direction as to the custody of the recordings.

The various warrants with the designated Judge who granted such warrants, and with a listing of the subject telephones, addresses whereof, and the duration of surveillance, were received in evidence as Government's Exhibits 1-7 (11-16).* Richard Nally, a federal agent, testified as to "sealing" instructions he gave to the other agents who were members of the investigating group (27). He testified, over objection, that each agent, after monitoring the auditioning and recording of the conversations, took the original tapes, sealed it, dated it and then initialed it and "then turn that over to me at as early as possibly convenient". That such tape "was then placed in a locked filing cabinet which I was the only one that had the key to." (28)

In regard to the first order dated November 10, 1972 the tapes procured under that order were brought to Judge Gurfein, sometime in December 1972 (30). That order expired November 24, 1972 (30). Judge Gurfein returned the relevant tape to Nally's custody (31). On January 8, 1974 he took certain tapes and presented them to Judge Bartels, judge of the United States District Court, Eastern District of New York. It appeared that Judge Bartels granted an eaves-

* ( ) This refers to the pagination of the minutes of the hearing had to determine the motion to suppress had on February 2, 1976.

dropping warrant. The presentment to Judge Bartels was 8 or 9 months after the expiration date of the warrant Judge Bartels granted (31, 32).

Received in evidence were Government Exhibits 71-76, the applications for sealing (33). These exhibits disclosed that: Government Exhibit 71, a sealing order, was dated January 8, 1974; Government Exhibits 72-75 were dated January 7, 1974; and Government Exhibit 76 was dated January 8, 1974 (32-34).

The minutes bore out also that there was no sealing order in regard to the tapes procured under Judge Gurfein's warrant (34). It was conceded by Nally that during the investigation he worked with the United States Attorney (38, 39).

In regard to the first warrant dated November 10, 1972 Nally brought the tapes made under that warrant to the United States Courthouse and Judge Gurfein sealed the container they were in and initialed "the evidence tape" (45).

Nally also confessed that he could not recall the number of tapes he took when he went to Judge Gurfein on December 10, 1972 (74, 75). However Nally was aware of the statutory requirement for sealing (75, 76). Nally had a similar lapse of memory when asked whether a record was made before Judge Gurfein as to the procedure had before that Judge in regard to the previously related "sealing" (76, 77).

Nally did recall that Judge Gurfein was requested

by another U.S. Attorney named Dougherty to do something in regard to the tapes but Nally did not remember the form of that request (77). Nally could not recall whether Judge Gurfein questioned him about the safeguarding of the tapes or where the tapes were kept or about the procedure in that regard (78).

When the second eavesdropping warrant expired, he knew the statutory requirement as to sealing (83). For a period of about one (1) year he didn't discuss the sealing of the tapes with any U.S. Attorney (84). In December 1973 a U.S. Attorney told him that the tapes had to be sealed (87, 88).

Furthermore this was his only investigation at the relevant time or times hereinabove set forth (99).

On redirect examination Nally related that no U.S. Attorney prior to January 1974 ever directed the return of the tapes to the issuing judge (104).

Carl C. Burgess, another federal agent, testified that he monitored the eavesdropping April 24, 1973. He identified Government's Exhibits 82 and 83 as the original reels containing conversations he overheard (113, 116). He sealed the tapes procured April 24, 1973 and then turned these exhibits over to Nally. The seals were unbroken as of the date of the hearing (113-115).

He also testified in regard to Exhibit 1, a chart which showed that Judge Gurfein's eavesdropping warrant

expired 15 days after its date, November 10, 1972.

In regard to the box containing tapes which was sealed by Judge Gurfein, the box was not available (139). Nor was there a written record of the proceeding before Judge Gurfein as to the sealing (157).

John Connaughton, another federal agent, testified that Government's Exhibit 84 was a box that had his initials on it, and the date he initialed it and delivered it to Nally. As of the date of the hearing the box or the container of that tape was still sealed (159).

POINT I

THE FAILURE TO ADHERE TO THE SEALING REQUIREMENT OF 18 U.S.C. 2518(8) (a) MANDATED SUPPRESSION OF THE EVIDENCE

The relevant portion of 18 U.S.C. 2518(8)(a) states that:

> "... Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for 10 years. Duplicate recordings may be made for the use or disclosure pursuant to the provisions of subsections (1) and (2) of Section 2517 of this chapter for investigations. The presence of a seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a pre-requisite for the use or disclosure and the contents of any wire or oral communications or evidence derived therefrom under subsection (3) of Section 2517."

18 U.S.C. 2517 in its relevant portion reads as follows:

> "(1) *** (2) *** (3) Any person who has received, by means authorized by this chapter ... any information concerning a wire or oral communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter ... may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any proceeding held under the authority of the United States ..."

Unlike the issue to suppress evidence gained by a claimed illegal search and seizure involving search warrants or otherwise legally procured, under the narrow exception to the 4th Amendment requirement of a warrant, where the evidence has a high degree of probity, the issue in this case is to the presence of the integrity of the evidence. It is suggested that any failure to conform to the legislative requirement of "immediate" sealing has a chilling effect on post-electronic surveillance requirements. In other words, the sealing requirement was not enacted to harass the government agents, or government attorneys, but to make sure that the evidence seized has probity and has not been tampered with. Dissimilar to the seizure of the conventional tangible evidence the seizure of oral evidence effected by secret eavesdropping, could never be returned to the aggrieved parties. See U.S. v. Focarile, 340 F. Supp. 1033 (D.C. Md.), affirmed on other grounds in U.S. v. Giordano, 469 F. 2d 522 (Cir. 4th, 1972), affirmed 416 U.S. 505 (1974).

The statutes authorizing electronic surveillance reflect the legislative intent to hold the authorities to the strict procedures governing this drastic method of investigation.

Electronic surveillance, unlike the ordinary investigation by a search warrant where the warrant has to be executed within ten (10) days, and where notice of the search and seizure is usually to be given to the suspect, and that at any rate the suspect usually knows about the search, is subject to two grades of judicial supervision and possibly a third grade. The first grade is the general warrant requirement, required by Katz v. U.S. 289 U.S. 347 (1967); U.S. v. United States District Court, 407 U.S. 297 (1972). The requirement of prompt sealing is in furtherance of judicial control over the exercise of an eavesdropping warrant which because of the sensitivity of electronic surveillance may also be grounded in the constitutional requirement under the due process clause of the 5th Amendment to the Federal Constitution. It is suggested the sealing requirement enforces the duty of authenticity.

Put another way, lack of sealing, lack of immediate sealing, can invite tampering, and if not tampering, an invitation to the parties to claim tampering because of the lack of timely sealing. The point overlooked by the appellant in this case is that immediate means at once,

because judicial control over the post-use of the warrant is explicitly set forth in the eavesdropping statutes. In other words eavesdropping has to be under judicial supervision and control both in regard to procuring the warrant, and in the use of the warrant, and the judicial supervision of the products of the electronic surveillance.

"Immediately" has been defined in Ballantine's Law Dictionary at page 542 as "promptly with expedition, with reasonable haste consistent with fair business activity ..."

In People v. Furdenberg, 209 N.Y. 218, at pages 220, 221, the word "immediately" was considered and defined. There it was said that:

> " ... 'It is impossible to lay down any hard and fast rule as to what is the meaning of the word 'immediately' in all cases. The word 'forthwith' and 'immediately' have the same meaning. They are stronger than the expression within a reasonable time and imply prompt, vigorous action, without any delay, and whether there has been such action has a question of fact having regard to the circumstances of the particular case .' ... This quotation expresses the law of the subject." (Internal quotations and citations omitted).

It is further suggested that since the delay in this case was so excessive and gross, it would seem that the Court that directed the sealing would not have had the capacity to remedy that which should have been done before because of the unreasonable and extensive delay on the part of the authorities. This situation is no different, it appears, from the requirement that a notice of appeal in a criminal case be served and

filed within ten (10) days. A belated attempt to serve and file the notice of appeal would be to no avail and there would be no corrective action that could be taken. See Rule 37 of the Rules of Criminal Procedure and Rule 4 (b) of the Federal Rules of Appellate Procedure. Under Rule 4(b) the most that the Court could undertake to accomplish corrective action, would be that the appellant shows excusable neglect in which event the Court extend the time for the filing of the notice of appeal for a period not to exceed thirty (30) days.

Put another way, the subsequent sealing of the tapes was meaningless and did not supply any cure for the failure of the authorities to conform to the legislative direction that the sealing be done immediately. It would appear that a court has no jurisdiction to enter an order which brings into the record an element which did not previously exist.

It is submitted that the eavesdropping statutes therefore should be strictly construed and as will be shown, serve the legislature directions. The eavesdropping statutes it is submitted are penal in nature and therefore should be strictly interpreted as was held in Kordel v. U.S., 335 U.S. 345, rehearing denied 335 U.S. 900 (1948).

18 U.S.C. 2510 et seq., comprised the statutory response to Berger v. N.Y., 388 U.S. 41 (1967); Katz v. U.S. 389 U.S. 347, (1967). Such statutes have for their purpose

the honoring of privacy and the promulgating of a comprehensive and limited procedure regulating the use of electronic surveillance. So Congress has stated in Senate Report Number 1097, 90th Congress, 2nd Session, 2 U.S. Code Congressional and Administrative News 2112 (1968). At page 2114 of Senate Report Number 1097 numerous Senators emphasized the strictness of the procedures found in the statutes relative to electronic surveillance and the judicial control to be made over these procedures. At page 2114 there is a statement by Senator Scott who stated that the proposed legislation had as its purpose circumscribed and tightly controlled electronic surveillance that would be under strict court supervision and that the purpose was to protect the right of privacy. Senator McClellan a sponsor of one of the bills that were merged into the ultimate wire tapping legislation consistently stressed the necessity for the strict conformity to the procedures and standards of the statutes stating that he didn't want any "loose administration of this law"; that the law was not to become a "catch-all for promiscuous use" and that the courts were to adhere to the "spirit and intent" in granting these applications, at page 508 of the Senate Report, supra. The senator also made a statement reported in 115 Congressional Record 23240 (1969) that the Courts should take the necessary time to examine all applications and that the Courts were to make the authorities strictly adhere to the statutory standards, at page 23241.

The United States Supreme Court held in U.S. v. Chavez, 416 U.S. 562 (1974) that:

> "Strict adherence by the government to the provisions of Title III would ... be ... in keeping with the responsibilities Congress has imposed ..." (At page 580)

See also Gelbard v. U.S., 408 U.S. 41, at page 46-47 (1974); U.S. v. Capra, 501 F. 2d 267, 276-277 (Cir. 2d, 1974), cert. denied 43 U.S. Law Week, 3515 April 14, 1975.

It is respectfully put that this Court approached the problem before it as it did in U.S. v. Marion, decided May 7, 1976 Circuit Court of Appeals, Second Circuit, Docket No. 75-1408, slip opinion 35 at page 3567, et seq. On page 3568 Chief Justice Kaufman stated as follows:

> "To guard against the realization of Orwellian fears and conform to the constitutional standards for electronic surveillance operations elaborated in Katz v. U.S., 389 U.S. 347 (1967) and Berger v. New York, 388 U.S. 41 (1967), Congress enacted Title III Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510 et seq. Title III imposes detailed and specific instructions upon both the interceptions of wire and oral communications, and the subsequent use of the fruits of such interceptions, in an effort to insure careful judicial scrutiny throughout. ... " (Emphasis supplied)

Counsel construes the word "throughout" as requiring the multi-level judicial control over electronic surveillance and as argued hereinabove, such control extends to the post-execution of the warrant stage.

Argued in the Court below was a ruling of the New York State Court of Appeals found in People v. Nicoletti,

34 N.Y. 2d 249, (1974). No useful purpose would be served by any extended discussion of that case as counsel is aware that the other appellees will probably argue that. However, this Court's attention is drawn to another recent ruling of the New York State Court of Appeals, not reported as yet, but contained in slip opinion number 43 in People v. Sher, which is reproduced herein and designated Appendix A. That case dealt with the issue that the police did originally cause to be sealed certain tape recordings. However prior to trial the police unsealed the tapes without a court order. The evidence was suppressed. A favorable result for the defendant was had based on People v. Nicoletti. The New York State Court of Appeals reasoned on pages 3 and 4 of that opinion that:

> "The Federal Communications Act was modified to permit states to intercept wire and telephone communications in accordance with the Congressional and Constitutional guidelines. (47 U.S.C. 605). ... From this review of legislative history, ... which are reflective of controlling federal law, must be strictly complied with. In the absence of compliance the state officials lack authority to wire tap, and any interceptions they make are unlawful, and any evidence derived from the wire tap is inadmissible. (18 U.S.C. 2515)."
>
> "The sealing requirement originated in the 1968 Omnibus Crime Control and Safe Streets Act. Congress endeavored to provide a procedure which would insure that the identity, physical integrity and contents of wire tap recordings would be protected from editing or alteration. While it may be argued that most law enforcement agencies have facilities for tape storage and security that is superior to the courts', Congress in enacting the 1968 Act made it absolutely clear that the recordings 'be considered confidential court records'. (Senate Report No. 1097, 2(1968) U.S. Code and Admin. News, 2112, 2193, supra)."

The Court concluded by construing its prior holding in Nicoletti, that the thing to be guarded against was the potential for the abuse of the lack of immediate sealing.

On pages 4 & 5 of that slip opinion, it was held again that there is no authority in the law enforcement agency or the prosecutor to handle the recordings without judicial supervision because they are regarded as confidential court records.

Finally the Court concluded that the burden was on the prosecution to establish conformity to the narrowly drawn eavesdropping statutes in question.

Nowhere does the government show as it cannot, any satisfactory explanation for the "absence" of judicially directed seals up to the time that the sealing was finally had. This is not the case where an agent searching for a suspect or evidence procures a warrant and overlooks some detail. Thus to encourage the use of warrants or the recourse thereto, the underlying applications will be judicially appraised in a "commonsense" fashion. See U.S. v. Ventresca, 380 U.S. 102 (1965), at page 108. However, in recognizing the practical necessities of a case it was also held that warrant applications are:

> "... normally drafted by non-lawyers in the midst and haste of a criminal investigation..." (at page 108).

Rather, this is a case where Nally who had a Department of Justice manual, was involved only in this investigation and

where there was a U.S. Attorney available for advice and direction, neglected to forthwith take recourse to a judge or judges for a direction as to sealing (17, 39, 40, 42, 75). No explanation was offered, and none is demonstrated in the appellant's brief. Rather on pages 9, 10 and 15 of the appellant's brief it is argued that the delay was not deliberate, there was no advantage to the government, no prejudice to the appellees, and that precautionary steps have now been taken to prevent a reocurrence of the omissions described in this case.

The prejudice to the appellees is that electronic surveillance is a severe restriction of this type of investigation by the government and that electronic surveillance and the effects of it have been aptly described in U.S. v. Marion, supra, Second Circuit, slip opinion at pages 3584-3585 as:

> "Strict compliance with the requirements of Section 2517(a) and other strictures imposed by Title III is no less essential. ... Congress carefully circumscribed utilization of the occasionally useful but potentially dangerous law enforcement tools of electronic surveillance in an effort to comply with the Fourth Amendment and to protect effectively the privacy of wire and oral communications (and) the integrity of the court in administrative proceedings ... or gloss over these restrictions or view them as mere technicalities to be read in such a fashion as to render them nugatory, then, is to place in peril our cherished personal liberties." (Internal citations, internal quotations omitted, and emphasis supplied).

Furthermore, while the appellant claims harmless error and treats the omission in this case as a mere technical

omission the appellees cite U.S. v. Ventresca, supra, 380 U.S. 102 at pages 101-102, which states:

> "... By doing so, it vindicates individual liberties and strengthens the administration of justice by promoting respect for law and order. This court is equally concerned to uphold the actions of law enforcement officers consistently following the proper constitutional course. This is no less important to the administration of justice than the invalidation of convictions because of disregard of individual rights or official overreaching. They obtained a warrant from a judicial officer ... It is vital that having done so their actions should be sustained under a system of justice responsive both to the needs of the individual liberty and to the rights of the community." (Emphasis supplied, internal citations and quotations omitted).

As stated in Berger v. New York, 388 U.S. 41 (1967) at page 58, a proceeding by a search warrant is "drastic"; it is further being held that the use of warrants "... must be carefully circumscribed so as to prevent unauthorized invasions of the sanctity of a man's home and the privacies of life ..." (Internal citations and quotations omitted).

As noted above, it is the potential for abuse that should impel this Court to affirm the order of suppression. Better expressed is a statement in Boyd v. U.S., 116 U.S. 616 (1885) at page 635 that:

> "... Though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, yet, as before said, it contains their substance and essence, and effects their substantial purpose. It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely: by

> silent approaches and slight deviation from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of personal property should be liberally construed. A close and literal construction deprives them of half their efficacy and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of its citizens, and against any stealthy encroachments thereon. ... We have no doubt that the legislative body is actuated by the same motives; but the vast accumulation of public business brought before it sometimes prevents it, on a first presentation, from noticing objections which became developed by time and practical application of the objectionable law."

It is respectfully submitted that in this case, the legislature noticed the "objections". It is unfortunate that the government did not notice the "objections", and seeks to avoid the consequences by arguing there is no damage to the defendants and nothing gained by the government. The gain by the government is that the government has come to a United States District Court seeking to convict these defendants and sending them to jail or having them pay fines. The least the government can do is to observe the rules. See Yellin v. U.S., 374 U.S. 109 (1963) at page 124.

It is further submitted that the statute is clear and leaves no problem for the interpreting of ambiguities. As stated in U.S. v. Marion, supra, slip opinion at page 3583:

> "We recognize that the so-called plain-meaning rule of statutory construction has fallen upon justifiably hard times ... But where the words of the statute and the clearly expressed intent of its drafters point inescapably to the same

> conclusion, we must decline to redraft the legislative enactment simply to avoid speculative adverse consequences that might flow from its proper construction." (Internal citations and quotations omitted).

Nor is the statute in this case so draconian, because it affords the government an escape hatch. It clearly provides that in the absence of sealing the government offer a satisfactory explanation for the absence of a seal; Section 2518 (8)(a). In regard to the sealing under the direction of Judge Gurfein, there was no order to that effect and no record kept (76-79). This, we submit, was a practice that can lead to delay in hearings before a criminal trial. Firstly it is unfair to the Judge not to have had an order presented to him and not to have had a record kept. The informality as to that proceeding can lead to protracted pre-trial hearings, reconstituting the unrecorded statements and possibly making a judge a witness. This informality mandates suppression either under the statute in question or under the supervisory jurisdiction of this court. If the U.S. attorney would have presented an order to Judge Gurfein, as to the sealing directions, and such order were granted, there would be no problem in regard to the initial stages of the wire tapping investigation under concern. Thus, Nally was asked on cross examination whether when the tapes were presented to Judge Gurfein he was asked any questions about the condition in which the tapes were to be kept and Nally answered "No" (78).

Reliance on U.S. v. Falcone, 505 F. 2d 478 (Cir. 3rd) 478 cert. denied 95 Supreme Court 1338; U.S. v. Sklaroff, 506 F. 2d 837 (Cir. 5th, 1975), is misplaced. Falcone dealt with a delay occasioned because of administrative delays. It appeared that the tapes had to be used to make a "composite tape" and to "transcribe certain portions of the tapes", see dissenting opinion at page 486. The government cannot offer that excuse in th. case, because they had duplicate tapes (43, 44, 45, 51).

In Sklaroff, at page 840 the government's omission was excused because:

> "... the purpose of this provision of the statute is to safeguard the recordings from editing or alteration. There was no showing that the integrity of the interceptions was in any way violated. The government accounted for the delay by showing that the recordings remained in the FBI evidence room for seven days and that the additional seven days were used in the preparation of search warrants."

Here we don't have a 14 day delay and furthermore there was no necessity to use the original tapes at all as the agents had duplicates.

In U.S. v. Lawson, appendix A, furnished by appellant, the appellees complained that the tapes were presented to a judge other than the one who granted the eavesdropping warrants, for directions as to sealing. This was held to be an inadequate argument. Next, the government argued that the agent who was involved caused the delay in the presentation of the tapes because he was involved in other assignments. The Court did

hold that that justification was slender. In this case of course Nally did not offer such an excuse.

In that case there was a 57 day delay. In U.S. v. Poeta, 455 F. 2d 117 (Cir. 2d 1972) cert. den. 406 U.S. 498 the authorities were confused on a question of law and that was held to be a proper explanation excusing the absence of a seal. Thus the delay in Poeta was 13 days and the "confusion" consisted of the fact that the state judge who granted the wire tap warrant was on vacation when the order expired and the authorities believed that only that judge could render directions for sealing. After 13 days the authorities were no longer confused and submitted the tapes to another judge who directed the sealing. Furthermore, the state statute was held to be ambiguous thus constituting an element of a satisfactory explanation.

This brings us to the remedies or the issue of suppression. This Court is initially respectfully requested to consider the violation of law and then the resulting consequences.

The government now seeks to argue on page 4 of its brief in the footnote that the government's omission in the Court below to perceive the significance of Nally's testimony could be remedied in this Court. For that statement the government relies on U.S. v. Tortorello, 2nd Circuit, slip opinion, at page 2879. But in Tortorello, the problem was a governmental concession as to the law which is not binding on

this Court. In this case Nally's testimony and the issue as to sealing results in a speculation as to fact. In other words, there is no clear-cut finding as to just how and when Judge Gurfein affixed his initials to the box that had a seal with his initials on it. Thus, Nally's testimony is characterized in that footnote that:

> "... The sealing of the November 10, 1972 must have occurred on or before December 14, 1972." (Emphasis supplied)

This is a conclusion of fact. In other words, the government is speculating.

The question is open as to whether the production of the tapes before Judge Gurfein had a written date made contemporaneously with Judge Gurfein's oral directions (30). Furthermore, the cross examination of Nally disclosed that he could not recall the exact number of tapes presented to Judge Gurfein initially (74).

The box containing a seal with Judge Gurfein's initials was missing (156, 157). Nor was Nally's informal and casual procedure followed as to all the tapes (67-69). Nally did not know the time he received the original tapes that were initially sealed by the agents and as to some tapes, he never received them personally. He testified some were found in the "mail slot" (72, 73).

Suppression is further applicable because this was not just a casual oversight. Nally was present when the first display of tapes was made to Judge Gurfein and he then knew of

the sealing requirement or should have known on the basis of that procedure. Yet from December 1972 to the ultimate date that the authorities learned of the omission on January 3, 1974, nothing was done. See the affidavits of the U.S. attorney named Shaw.

It is submitted that aside from 18 U.S.C. 2518 (10) (a), other sections of Title III mandate suppression.

47 U.S.C. 605 (Federal Communications Act) itself provides that.

> "Except as authorized by ... 18 U.S.C. Sections 2510-2520 no person receiving, assisting in receiving, transmitting or assisting in transmitting any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect or meaning thereof."

18 U.S.C. 2517 (3) supra, likewise prohibits disclosure of the contents of a communication or derivative evidence as described in that statute where there was an illegal interception, that is an interception not in accordance with 18 U.S.C. 2510-2520.

18 U.S.C. 2515 itself forbids the use of the product of electronic surveillance if the disclosure would be in violation of the relevant statutes.

Furthermore, following the initial warrant and the use of the evidence seized thereunder, the authorities used such evidence to procure other warrants. They procured the other warrants from judges. Yet the authorities never presented to the other judges the issue before this Court. It

is submitted that the interception under the successive warrants was illegal because such successive warrants were the effect of the omission of Judicial Direction and therefore the interception under the successive warrants was an illegal interception.

18 U.S.C. 2518(10)(a) states that an aggrieved person as defined therein can move to suppress the contents gleaned and procured from the interception where:

> "(i) the communication was unlawfully intercepted;
>
> (ii) ***
>
> (iii) the interception is not made in conformity with the order of authorization or approval."

Since the successive warrants were based on the initial warrant and the sealing requirement was not followed in regard to the initial warrant, it is submitted that the subsequent communications were illegally intercepted. Furthermore, it is contended that the subsequent interceptions were not made in conformity with the order of authorization or approval because those prior orders may not have been approved if the Court learned that the prior sealing was not had in conformity to the statutes.

As stated in U.S. v. Lawson, supra,:

> "The government has suggested that the post-interception sealing violations by their nature might not be cognizable under 18 U.S.C. Section 2518 (1)(a)(i) suppression section ... We do not agree and we hold that the post-interception violations must also be scrutinized to determine

> If the failure to satisfy the statutory requirements directly and substantially effect the Congressional intention to limit the use of intercept procedures and to comply with Fourth Amendment principles. ..."

Furthermore, this is not merely a technical issue. All electronic surveillance is deemed violative of the 4th Amendment to the Federal Constitution. Hence where the legislature permits it, failure to conform to the legislative mandate cannot be harmless error. Failure to conform to the legislative mandate puts the government in the position where there is illegal electronic surveillance. As was held in U.S. v. Bernstein, 509 F. 2d 996, (Cir. 4th, 1975) at page 1004:

> "Suppression however, does not depend on proof of prejudice ... Congress defined an aggrieved party as a 'party to any intercepted wire or oral communication or a person against whom the interception was directed'. Prejudice is not an element of the definition. Furthermore, the statute gives the District Court no discretion to deny, because of lack of prejudice, an aggrieved person's motion to suppress when an interception is unlawful. We conclude from the unequivocal language of Title III that Congress intended any unlawful invasion of an aggrieved person's privacy to be sufficient harm in itself to require suppression ..."

In U.S. v. Capra, 501 F. 2d 267 (Cir. 2d, 1974) it was stated in part on pages 276-277 that:

> "... Title III creates federal wire tapping procedures that also operate as national standards ... The standards are to be construed strictly because Congress knew that it was creating an investigative mechanism which potentially threatened the constitutional right to privacy and it carefully wrote into the law the protective procedures for the issuance of warrants ..."

"..., Congress made clear its intention to require suppression where there is a failure to satisfy any of those statutory requirements that directly and substantially implement the Congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device ..." (Omitting internal quotations and citations).

"The District Court, therefore, had no discretion to decide whether to exclude the evidence obtained in violation of Title III. The good faith efforts and worthy intentions of the police, the prosecutor's lack of experience and need of secretarial assistance, as well as his election to give priority to a holiday, are wholly extraneous considerations."

In U.S. v. Bellosi, 501 F. 2d 833 (D.C. Cir. 1974), it appeared that a wire tap application did not allege that one of the subjects was subject to interception before that instant application. It was held that the application was defective because the government failed to disclose the prior wire tap applications against one of the defendants.

POINT II

THE STATUTES AUTHORIZING ELECTRONIC SURVEILLANCE ARE UNCONSTITUTIONAL IN THAT THEY VIOLATE THE FOURTH AMENDMENT, THE FIFTH AMENDMENT (PRIVILEGE AGAINST SELF-INCRIMINATION AND DUE PROCESS OF LAW) AND NINTH AMENDMENTS TO THE FEDERAL CONSTITUTION.

Counsel raised the issue of the unconstitutionality of the statutes in the court below. Counsel ever mindful of U.S. v. Indiviglio, 352 F. 2d 276 (Cir. 2d, 1965); Estelle v. Williams, U.S. Supreme Court, No. 74-676, 44 U.S. Law Week at pages 4609, 4613 and Frances v. Henderson, U.S. Supreme Court, May 3, 1976, 44 U.S. Law Week, 4620, at pages 4621, 4622, therefore has to argue this.

considered a nuisance. See In Re Lanza, 6 Misc. 2d 411, 163 N.Y.S. 2d 576 at page 577 where it was stated on page 579 in part that:

> "If we are to enjoy the benefits of a free society, we must have guaranteed to us the right of freedom of thought and of speech. Freedom of speech, of necessity includes the right to be free from unwarranted secret listening of interference by others. The privacy of all free citizens is a fundamental and basic right ... Blackstone in his Commentarys...defining the offense of eavesdropping says: 'eaves-droppers, or such as listen under walls or windows of the eaves of a house to harken after discourse, and thereupon to frame slanderous and mischievous tales are a common nuisance' ..."

Furthermore, the 3rd Amendment to the Federal Constitution provides against the quartering of the military in the houses of persons. It is difficult to see how the transistor can circumvent that direct prohibition. As a matter of fact the quartering of troops in a citizens' house as pernicious as such practice can be, is still not as bad as surreptitious electronic surveillance. At least the householder knew that strangers were in his house. Here notice is dispensed with prior and during the surveillance, and while notice should be given under the Act within the period of time provided for by the statute, it can nevertheless still be postponed by the statute.

POINT III

COUNSEL ADOPTS ALL THE OTHER ARGUMENTS RAISED BY COUNSEL FOR ALL THE OTHER APPELLEES IN THIS CASE.

CONCLUSION

THE ORDER APPEALED FROM SHOULD BE AFFIRMED.

Respectfully submitted,

PETER J. PELUSO
Attorney for Defendant
DAVY TREGCAGNOLI

ROBERT BLOSSNER
Attorney for Defs. Formosa & Palermo

FREDERICK S. GOLDSTEIN
Attorney for Defendant Raugi

ARNOLD E. WALLACH
On the Brief

State of New York
Court of Appeals

3 No. 43
The People &c.,
Respondent,
vs.
Seymour Sher,
Appellant.

OPINION

This opinion is uncorrected and subject to revision before publication in the New York Reports.

(43)
J. Raymond Fisher for appellant.
Sol Greenberg, District Attorney (Dennis M. Acton of counsel) for respondent.

JASEN, J.:

On October 7, 1971, Seymour Sher was indicted by the Grand Jury of Albany County for the felony of possession of gambling records in the first degree. After trial, the jury convicted the defendant of the charge and the judgment of conviction was affirmed by the Appellate Division. We conclude that the People failed to provide a satisfactory explanation for the absence of seals on tapes of intercepted telephone conversations and would reverse the order of the Appellate Division.

The State Police, acting on the basis of surveillance reports and information derived from court-ordered wiretaps, obtained a search warrant commanding the search of Apartment B, 390 Madison Avenue, Albany, New York, as well as the person of the defendant, Seymour Sher. On August 26, 1971, the

police executed the warrant, capturing the defendant and seizing gambling records, adding machines, unused stationery and over $1,300 in United States currency. At the trial, these items were introduced into evidence. A tape recording of an incriminating telephone conversation between the defendant and another person was played to the jury. Tape recordings of other equally incriminating conversations were admitted into evidence. The defendant made timely objections to the introduction of this evidence, on the ground that the People had failed to comply with the sealing requirement of the Criminal Procedure Law. (CPL §§ 700.50[2], 700.65[3].) A police investigator did state, as an aside in his direct examination, that the tapes had been sealed pursuant to a court order and had been retained by the officer in his own custody. The tapes were unsealed two or three days prior to trial, "f r the purposes of this trial."

Section 700.35, subdivision 3 of the Criminal Procedure Law provides that the contents of any intercepted communication must, if possible, be recorded in such a manner as to protect the contents from editing or other alteration. Immediately upon the expiration of the eavesdropping warrant, the recordings "must be made available to the issuing justice and sealed under his directions." (CPL § 700.50[2].) A person who has, pursuant to the Criminal Procedure Law provisions, obtained information concerning an intercepted communication "or evidence derived therefrom" may not testify regarding this knowledge unless the seal is still present on the recordings or a satisfactory explanation for its absence is provided. (CPL § 700.65[3].)

In People v Nicoletti (34 NY2d 249, 253), we held that the sealing requirement must be strictly construed. The need for rigid adherence to the statutory procedure is explained by the history of our present wiretapping provisions. Until 1968, the Federal Communications Act of 1934 prohibited any person unauthorized by the sender from intercepting and revealing the contents of any communication. (Act of June 19, 1934, c 652, Title VI, § 605, 48 Stat. 1103, as amended by 47 USC § 605.) On June 17, 1968, the Supreme Court held

that the federal statute precluded the states from introducing into evidence at state criminal trials evidence of telephone communications intercepted by state law enforcement officials. (Lee v Florida, 392 US 378.) Earlier, the Supreme Court had set out the constitutional standards regulating the use of electronic eavesdropping equipment, as distinguished from wiretapping devices, by law enforcement officials. (Berger v New York, 388 US 41; Katz v United States, 389 US 347.) Congress, in Title III of the Omnibus Crime Control and Safe Streets Act of 1968, signed into law but two days after the Supreme Court's decision in Lee v Florida (supra), authorized both federal and state law enforcement officials to conduct wiretaps and other electronic surveillance, provided due compliance was made with statutory procedures designed to comport with the constitutional requirements. (18 USC 2516[2]; Senate Report No 1097, 2 [1968] U. S. Code & Admin. News 2112, 2113.) Among the Congressional requirements was the direction that intercepted wire or oral communications be recorded, if possible. The recording should be done in a manner designed to protect the recording from editing and alteration, and be made available to the judge that issued the warrant for sealing under his directions. "The presence of the seal * * * or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom * * * *" (18 USC § 2518[8][a].)

The Federal Communications Act was modified to permit states to intercept wire and telephone communications in accordance with the Congressional and constitutional guidelines. (47 USC § 605.) Thereafter, our state revised its electronic surveillance statutes to comply with the federal statutes (Denzer, Practice Commentaries, McKinney's Cons. Laws of N. Y., Book 11A, CPL, art 700, pp 242-243.) The provisions of article 700 of the Criminal Procedure Law track, as they must, the language of the federal law. From this review of the legislative history, it is clear that the requirements of article 700, which are reflective of controlling federal law, must be strictly complied

with. In the absence of compliance, the state officials lack authority to wiretap, and any interceptions they make are unlawful, and any evidence derived from the wiretap is inadmissible. (18 USC § 2515.)

The People contend, on this appeal, that the absence of the seals is sufficiently explained by the need to use the tapes to prepare for trial. Bearing in mind the purpose and intent of the sealing requirement, we conclude that this excuse is unsatisfactory.

The sealing requirement originated in the 1968 Omnibus Crime Control and Safe Streets Act. Congress endeavored to provide a procedure which would ensure that the identity, physical integrity and contents of wiretap recordings would be protected from editing or alteration. While it may be argued that most law enforcement agencies have facilities for tape storage and security that are superior to the courts', Congress in enacting the 1968 Act made it absolutely clear that the recordings "be considered confidential court records". (Senate Report No. 1097, 2 [1968] U. S. Code & Admin. News 2112, 2193, supra.)

In our view, the failure of the prosecution to obtain judicial approval for the unsealing of the tapes and the absence of judicial supervision over the unsealing process violated the procedure clearly mandated by the federal and state statutes. As in People v Nicoletti (34 NY2d 249, 253, supra), no claim is made, nor is there any indication, that the tape recordings involved were in any way altered. "It is the potential for such abuse to which we address ourselves." Sealing reduces the risk that skillful editors might make alterations that are undetectable without the use of technical experts and sophisticated, expensive electronic equipment. Moreover, the requirement also assists in establishing a chain of custody and serves to protect the confidentiality of the tapes. (Id.)

We do not doubt that the prosecution had a valid purpose in opening up the tapes in order to use them for trial preparation. However, this purpose does not authorize the police or the District Attorney, on their own, to

unseal recordings that should be regarded as confidential court records. Duplicate tapes, as authorized by the court, could have and should have been made and there would have been no need to disturb the sanctity of the originals. (See People v Nicoletti, supra at pp 253-254.) Alternatively, if there was a remaining need to unseal the originals, judicial permission and supervision should have been obtained prior to the unsealing.

The sealing requirement was designed to prevent the abuse of wiretap recordings. To that end, as we held in Nicoletti, the requirement must be strictly construed. The burden is on the prosecution to establish due compliance with the statutory procedures. We adhere to the rule announced in Nicoletti.

Although only one tape was actually played to the jury, other tapes, as well as physical evidence derived from the wiretaps, were admitted into evidence. The failure to comply with the sealing requirement rendered all of these items inadmissible. (CPL § 700.65[3].) We are compelled to conclude that there is a significant probability that the jury's verdict would have been different had this evidence been excluded from the jury's consideration (People v Crimmins, 36 NY2d 230, 242.) We would, therefore, reverse the order of the Appellate Division. It is still open to the People to prove their case without the benefit of the wiretap recordings or the evidence derived therefrom. Therefore, we do not direct dismissal of the indictment, but, instead, we would direct that a new trial be had. Accordingly, the order of the Appellate Division should be reversed and a new trial ordered.

* * * * * * * *

Order reversed and a new trial ordered. Opinion by Jasen, J. All concur. Cooke, J., taking no part.

Decided February 19, 1976

WALLACH US v. Tregcagnoliet al

STATE OF NEW YORK)
: SS.
COUNTY OF NEW YORK)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 21 day of May 197 6 deponent served the within Appellee's ~~Brief~~ upon:

U.S. Attorney, Southern District of New York

rney(s) for

Appellant

in this action, at

1 St. Andrews Pl.
NYC

the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Robert Bailey

Sworn to before me, this 21
day of May, 197 6

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1977